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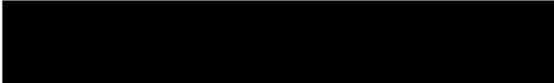


FILE:

Office: FRANKFURT, GERMANY

Date: FEB 01 2008

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer-in-Charge (OIC), Frankfurt, Germany, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the OIC issued the decision on February 1, 2006. It is noted that the OIC properly gave notice to the applicant that he had 33 days to file the appeal. Although dated February 17, 2006, Citizenship and Immigration Services did not receive the applicant's appeal in filing condition until March 9, 2006, 36 days after the decision was issued.<sup>1</sup> Accordingly, the appeal was untimely filed. The OIC erroneously forwarded the matter to the AAO.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the untimely appeal meets the requirements of a motion to reopen. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the OIC. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the OIC must consider the untimely appeal as a motion to reopen and render a new decision accordingly.

**ORDER:** The appeal is rejected. The matter is returned to the OIC for treatment as a motion and the issuance of a new decision.

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<sup>1</sup> The OIC stated the following on the cover page of his February 1, 2006 denial:

You must submit such an appeal to **THIS OFFICE** with a **filing fee of \$385.00** and completed Form I-290B, which is attached to this letter . . . Do **NOT** send the I-290B directly to the Board or the OAA [bolding and capitalization in original].

Despite the OIC's instructions not to send the Form I-290B directly to the AAO, the applicant sent the Form I-290B to the AAO. On appeal, the applicant's wife asserts that the Form I-290B itself states that the form is to be filed with the AAO. However, the paragraph in the instructions to the Form I-290B to which she refers states that any materials submitted *after* filing the appeal are to be submitted directly to the AAO. In this case, no appeal had yet been filed at the time she submitted her evidence to the AAO.